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THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

GABRIEL HERRERA,

Defendant and Appellant.

A124184

(Solano County  
Super. Ct. No. FCR211932)

The trial court reinstated appellant Gabriel Herrera's probation with an extended term based upon appellant's admission that he violated the terms of his probation. On appeal, he claims the trial court should have dismissed the petition alleging a probation violation for lack of jurisdiction because he constructively filed a request for speedy sentencing in absentia under Penal Code<sup>1</sup> section 1203.2a after he was committed to prison in Nevada for a new offense. We affirm.

**PROCEDURAL BACKGROUND**

In April 2004, appellant pleaded no contest to carrying a concealed weapon in a vehicle (§ 12025, subd. (a)(1)) and driving under the influence (Veh. Code, § 23152, subd. (a)). After he failed to appear at his sentencing hearing, the court issued a bench warrant for his arrest. When appellant ultimately appeared for sentencing in June 2006, the court suspended imposition of sentence and placed appellant on three years' formal

<sup>1</sup> All statutory references are to the Penal Code unless otherwise specified.

probation. The court did not object to appellant completing his probation in Nevada pursuant to an interstate compact with that state.

Appellant twice failed to appear at hearings in January 2007 to modify the terms of his probation. The court revoked appellant's probation and issued a bench warrant for his arrest.

On July 6, 2007, appellant was sentenced to prison in Nevada on a new conviction for driving under the influence. The Interstate Commission for Adult Offender Supervision informed the Solano County Probation Department of appellant's Nevada sentence in a July 2007 letter. After completing his sentence in Nevada, appellant was paroled on house arrest through July 2008. He admitted he waited until after he completed parole in Nevada to have his wife contact the Solano County Superior Court to place his case on calendar.

On September 29, 2008, appellant moved to dismiss his pending probation violation in Solano County. He argued the trial court was divested of jurisdiction as a consequence of his probation officer's failure to report his Nevada prison confinement to the court within 30 days of receiving actual notice of the new prison term. The trial court denied appellant's motion to dismiss on December 1, 2008, concluding it retained jurisdiction because appellant had failed to notify Solano County in writing of his Nevada prison commitment and specifically request that he be sentenced in absentia under section 1203.2a.

Following the denial of his motion to dismiss, appellant admitted at a hearing conducted on December 5, 2008, that he had violated the terms of his probation. The court revoked his probation and ordered a supplemental probation report. On February 20, 2009, the court reinstated appellant's probation and extended its term until June 15, 2010. Appellant filed a timely notice of appeal.

### **DISCUSSION**

Appellant's sole claim on appeal is that the trial court should have dismissed the petition alleging a probation violation for lack of jurisdiction because he constructively filed a request for speedy sentencing in absentia under section 1203.2a. We disagree.

“ ‘The purpose of section 1203.2a is to prevent inadvertent consecutive sentences which would deprive defendant of the benefit of section 669, providing that sentence shall be concurrent unless the court expressly orders otherwise. [Citations.]’ [Citation.]” (*People v. Wagner* (2009) 45 Cal.4th 1039, 1053.) “[S]ection 1203.2a permits a defendant who has been released on probation and subsequently committed to a state prison for another offense, to request the trial court that granted probation to revoke probation and impose sentence.” (*In re White* (1969) 1 Cal.3d 207, 210.)

“The statutory requirements [in section 1203.2a] differ, to some extent, depending on the procedural posture of the case, i.e., whether imposition of sentence was suspended (sentence has not previously been imposed) or . . . sentence was imposed but execution thereof was suspended (sentence has previously been imposed).” (*People v. Murray* (2007) 155 Cal.App.4th 149, 155.) As the California Supreme Court has summarized, “section 1203.2a provides for 3 distinct jurisdictional clocks: (1) the probation officer has 30 days from the receipt of written notice of defendant’s subsequent commitment within which to notify the probation-granting court (2d par.); (2) the court has 30 days from the receipt of a *valid, formal request* from defendant within which to impose sentence, if sentence has not previously been imposed (3d par., 4th sentence); and (3) the court has 60 days from the receipt of notice of the confinement to order execution of sentence (or make other final order) if sentence has previously been imposed (3d par., 3d sentence). Failure to comply with any one of these three time limits divests the court of any remaining jurisdiction. (5th par.)” (*People v. Hoddinott* (1996) 12 Cal.4th 992, 999, italics added.)

The “valid, formal request” that must be made by a defendant who seeks to have his or her sentence imposed in absentia, and to which the court referred in *People v. Hoddinott*, is described in the first paragraph of section 1203.2a. The statute provides that a defendant who has not been sentenced may seek to be sentenced in absentia either through a request by counsel *or* a written request from the defendant himself or herself, but only if the writing “is signed in the presence of the warden of the prison in which he or she is confined or the duly authorized representative of the warden, and the warden or

his or her representative attests both that the defendant has made and signed such request and that he or she states that he or she wishes the court to impose sentence in the case in which he or she was released on probation, in his or her absence and without him or her being represented by counsel.” (§ 1203.2a.)

In contrast to the procedure applicable to a defendant who has not yet been sentenced, in the case of a defendant who has been sentenced with the execution of the sentence suspended, section 1203.2a does not require a formal statement that the defendant waives his or her right to a formal revocation hearing and counsel. (*People v. Murray, supra*, 155 Cal.App.4th at pp. 156-157.) Instead, the statute simply provides that the “court shall issue its commitment if sentence has previously been imposed” upon being “informed by the probation officer of the defendant’s confinement, or upon receipt from the warden or duly authorized representative of any prison in this state or another state of a certificate showing that the defendant is confined in prison . . . .” (§ 1203.2a.)

The procedures are different depending upon the procedural posture of the case because a defendant has a constitutional and statutory right to be present at critical stages of a criminal prosecution, including sentencing. (See *People v. Romero* (2008) 44 Cal.4th 386, 418; *People v. Gutierrez* (2003) 29 Cal.4th 1196, 1202.) A defendant who has already been sentenced obviously has no need to waive the right to be present at sentencing. A defendant who has not yet had a sentence imposed, by contrast, retains the constitutional and statutory right to be present for sentencing. This right is not absolute, however, and may be waived by a competent defendant. (§ 1193, subd. (a); *People v. Robertson* (1989) 48 Cal.3d 18, 62.) Section 1203.2a provides specific procedures that must be followed by a defendant who seeks to waive the right to be present at sentencing.

Here, appellant failed to follow these procedures. His counsel did not make a request for sentencing in absentia, and appellant did not himself submit a written request, attested to by the warden or the warden’s authorized representative, indicating that he wished to waive his right to be present at sentencing and to be represented by counsel. Instead, the only notice the county received was a letter from the Interstate Commission

for Adult Offender Supervision informing the probation department that appellant had been sentenced to prison in Nevada.

Appellant acknowledges he did not comply with the procedures for requesting speedy sentencing under section 1203.2a. He claims to have constructively complied with the statutory procedures because Solano County had actual knowledge that he was imprisoned in Nevada. He argues, therefore, that the court's jurisdiction lapsed due to the county's failure to take action in a timely manner.

Appellant's argument fails to distinguish between cases in which sentence has been imposed, such as *People v. Murray, supra*, 155 Cal.App.4th 149, on which he relies, and cases such as this one in which imposition of sentence has been suspended. In the latter situation, the court cannot impose sentence under section 1203.2a without a valid waiver of the defendant's right to be present at sentencing. “ ‘[R]equests for sentencing pursuant to section 1203.2a must be in strict compliance with that section. [Citations.] . . . [I]f the court pronounces judgment in the absence of such a request and waiver, it violates the defendant's constitutional rights to have the assistance of and to be personally present with counsel. [Citation.]’ [Citation.]” (*People v. Wagner, supra*, 45 Cal.4th at p. 1054.) As the court in *People v. Wagner* explained, in the absence of a valid request for speedy sentencing that waives the defendant's personal appearance, “ ‘there is no prescribed time limit within which the probation officer and the court must act when imposition of sentence was previously suspended . . . .’ [Citation.]” (*Ibid.*) Thus, notification of appellant's commitment to prison from the Interstate Commission for Adult Offender Supervision did not start the 30-day jurisdictional clock to act under section 1203.2a.

Nor did the court lose jurisdiction based upon the alleged failure of the probation officer to report appellant's commitment in Nevada to the Solano County Superior Court. The second paragraph of section 1203.2a provides that a defendant's probation officer *must* inform the court of the defendant's commitment to prison within 30 days after receiving notification from specified sources: “The probation officer may, upon learning of the defendant's imprisonment, and must within 30 days after being notified in writing

by the defendant or his or her counsel, or the warden or duly authorized representative of the prison in which the defendant is confined, report such commitment to the court which released him or her on probation.” Notably, the probation officer is not required to notify the court if the officer learns of the defendant’s imprisonment by a source other than those specified. In such a case the probation officer “may” inform the court of the defendant’s imprisonment. (§ 1203.2a.) Here, appellant’s probation officer was not notified in writing by appellant, his counsel, or the warden or duly authorized representative of the prison in Nevada. Accordingly, appellant’s claim fails under this theory as well.

Because appellant failed to take steps necessary to invoke his rights under section 1203.2a, his motion to dismiss for lack of jurisdiction was properly denied.

**DISPOSITION**

The judgment is affirmed.

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McGuiness, P.J.

We concur:

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Siggins, J.

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Jenkins, J.